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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO CASTELLAR, et al.,
Plaintiff-Petitioners,

v.

JOHN F. KELLY, Secretary of Homeland Security, et al.,
Defendant-Respondents.

Case No. 3:17-cv-00491-BAS-BGS

PLAINTIFF-PETITIONERS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Courtroom: **4B**
Judge: **Hon. Cynthia Bashant**

NO ORAL ARGUMENT UNLESS REQUESTED BY JUDGE

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I. INTRODUCTION

This suit seeks to redress a common practice that Defendants apply to every member of the proposed class—denying immigration detainees a first hearing before an immigration judge for over a month after detaining them. Defendants do not dispute that every member of the proposed class suffers this same treatment. The named Plaintiffs are all typical of the problem: each was detained for at least a month before receiving a first hearing.

The first appearance before an immigration judge is a critical stage of the proceeding for all class members. For the first time, a neutral adjudicator informs them of the charges against them and provides important advisals about their rights, in laymen's terms in their own language. ECF No. 1 ¶ 29. It is the first time a judge will review the threshold justification for their detention—that they are removable aliens—and the first meaningful opportunity to challenge the government's determination that they must remain in custody while they seek relief from removal. *Id.* ¶¶ 3, 30-31. It is the first time the judge will review the charging document to make sure it was properly served and contains no defects. *Id.* ¶ 30. A first appearance without a lawyer places the detainee on a list that may be circulated to pro bono legal service providers, and the immigration judge ensures they have received a list of those providers, both of which improve the chances of securing pro bono counsel. *Id.* ¶ 29, 33. And, detainees may for the first time request the evidence the government intends to use against them and learn how to move their case toward ultimate resolution. *Id.* ¶ 29, 32.

The claim presented is uncomplicated: that, for the named Plaintiffs and every other member of the proposed class, a delay of longer than a month before that hearing is unlawful under both the Constitution and relevant statutes. The Court can provide relief to all proposed class members "in one stroke" by holding that a one month delay is unreasonable and illegal, and ordering that the practice be changed to provide for more prompt hearings. This case is thus a poster child for class certification. Resolving these issues in a single suit is far more efficient than forcing

individual suits from hundreds of detainees, and it may in fact be the only way to provide effective relief, as individual suits could well become moot before the Court could act on them.

Defendants misunderstand Plaintiffs' position to be that the hearing must be provided "within" 48 hours. Not so. A prompt hearing must be scheduled and held for each detention that *reaches* 48 hours, because that is the time by which the government is legally obligated makes its decision to keep someone in custody for proceedings. ECF No. 1 ¶¶ 22, 68, 78-79. Plaintiffs have intentionally defined the class to begin at 48 hours, as a reasonable accommodation to allow Defendants time to make this decision. But at a minimum, the decision at that point triggers the requirement of presentment to a neutral adjudicator—in this case, an immigration judge—promptly *thereafter*.

The definition of "prompt" is up to the Court, but for present purposes, the claim is that one month is too long. After some discovery regarding the procedures employed at present and the alleged justification for delay, plaintiffs may recommend a cutoff or the Court can choose its own. Perhaps the Court will say Defendants must provide a first appearance the day the decision to keep class members in custody is made, or the next day, or even within 5 days, but that does not change the fact that each class member is presenting the same claim. Whatever the ultimate timeframe, because hearings and advisements are already given to immigration detainees, simply requiring that they be given more promptly, as is required in every other detention context, is far from the "unworkable remedy" Defendants portend. *See Armstrong v. Squadrito*, 152 F.3d 564, 572 (7th Cir. 1998) ("[W]hen a state provides for a first appearance, it would place a small burden on the state to ensure the timeliness of that appearance."); *see also* Pls.' Opp'n. to Defs.' Mot. to Dismiss at 23-24.

Defendants' arguments opposing class status are all unpersuasive. Defendants do not assert that each class member's claim is unique, but rather attempt to divide the class into subgroups based upon which statute they are held under or other different

status. Some of these subgroups are not, or were not intended to be, in the proposed class, like those with expedited removal orders or unaccompanied children.

Other purportedly differentiating characteristics—like the different statutes employed by Defendants to detain—do not differentiate the class members in a legally meaningful way, because all proposed class members face delays of longer than a month, which are unlawful under the Constitution and relevant statutes regardless of the detention statute relied upon. All federal statutes, of course, must comply with the Constitution, and while the different detention statutes may impact the precise manner in which detainees are authorized to challenge custody, those challenges will happen too late to meet constitutional imperatives. Moreover, the Ninth Circuit's *Rodriguez* decision rejected the notion that such statutory differences prevent certification in a case strikingly parallel to this one. Yet despite Plaintiffs' frequent reference to *Rodriguez* in their opening brief, Defendants, presumably finding no answer, ignore it altogether.

The Court should certify the proposed class, because it can address the harm to all class members with a single declaration or injunction finding the current practice unlawful.

II. ARGUMENT

A. The Proposed Class Meets the Requirements of Federal Rule of Civil Procedure 23(a)

1. The Class Members All Share the Same Constitutional and Statutory Claims that Can Be Addressed in a Single Stroke

This case certainly raises some "questions of law or fact common" to all proposed class members, as required by Federal Rule of Civil Procedure 23(a)(2). Rule 23(a)(2) does not require that every question in the case be common. *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) ("So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2).") (internal citations and quotations omitted).

Plaintiffs have alleged that Defendants have a practice of detaining everyone in the proposed class for longer than one month before first presenting them to an

immigration judge ("IJ"). ECF No. 1 ¶ 58; Vakili Decl., ECF No. 2-2 at ¶ 4. Defendants don't dispute that, and they admit that all three named plaintiffs were detained over a month before their first hearing. ECF No. 30 at 8-10. This practice thus raises common legal questions for every proposed class member: is confinement of 30 days or more without a hearing unlawful under the Fourth Amendment, the Fifth Amendment, and/or relevant statutes?

The answer to each of those questions should be the same for each class member, regardless of the statute that authorizes their detention.[1] Either the Constitutional provisions and/or the Immigration and Nationality Act ("INA") prohibit the government from subjecting people to a month of detention before seeing an IJ or they don't. The Court can readily and efficiently answer those questions once in a class action suit, which is far better than inviting hundreds of individual suits, because Plaintiffs are seeking the enforcement of "a constitutional floor equally applicable" to everyone in the class. *Lyon v. U.S. Immigration & Customs Enf't*, 308 F.R.D. 203, 211-12 (N.D. Cal. 2015) (internal citations and quotations omitted).

Indeed, a class action may be the only way to provide relief, as individual suits could all become moot if the Court is unable to act before a detainee eventually does receive a first hearing. *See Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998) (certifying class of non-citizens facing removal orders serves the purposes of "ensuring that absentee members are fairly and adequately represented" and "ensuring practical and efficient case management."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) (*Rodriguez I*) (Certification of detainee class "would render management of these claims more efficient for the courts," and "would also benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone.").

[1] That is, the Fourth Amendment claim should be resolved the same way for each class member, and likewise the Fifth Amendment, and likewise the statutes, even if the questions are decided differently from each other on the merits.

Recognizing these realities, the Ninth Circuit and district courts have held that Rule 23(a)(2) is met by a class of detainees who raise the same common constitutional and statutory claims, even if the basis for their detention varies. *See, e.g., Rodriguez I*, 591 F.3d at 1123-24; *Franco-Gonzalez v. Napolitano*, No. CV 10-0221 DMG (DTBx), 2011 WL 11705815, at *16 (C.D. Cal. Nov. 21, 2011); *cf. Parsons*, 754 F.3d at 678.

In fact, *Rodriguez I* is directly on point and forecloses Defendants' arguments. There, a class of immigration detainees challenged their prolonged detention for "more than six months without a bond hearing while engaged in immigration proceedings." *Rodriguez I*, 591 F.3d at 1111. The government opposed certification because, *inter alia*, detainees were held under different provisions of the INA, which conferred upon them different rights to a bond hearing. *Id.* at 1122. In holding the class satisfied Rule 23(a)(2), the Court concluded that the various statutes authorizing detention of different class members did not materially impact whether there was "some shared legal issue or a common core of facts" regarding class members' right to a bond hearing, which "the proposed members of the class certainly have." *Id.* at 1122-23.

Defendants ignores *Rodriguez I* and similar binding cases cited in Plaintiffs' opening brief (ECF No. 2-1) and nevertheless argue against commonality on the unsupported assertion that "the question of when an alien first sees an immigration judge varies based on the multiple statutes of detention." ECF No 30 at 14. But all detainees under all these statutes are detained for more than 30 days without a hearing. Defendants fail to identify what difference those statutes—the exact statutes the court in *Rodriguez I* concluded made no difference there—make to the common issue of whether more than a month of detention without a first appearance is unlawful.

The argument also makes no sense in light of the nature of the hearing Plaintiffs are seeking to expedite—a basic but critical first appearance at which detainees can challenge the legal authority for their custody, challenge or schedule a challenge to the necessity or validity of their confinement, receive important advisals applicable to all detainees in plain language through an interpreter, and benefit from an immigration

judge's assessment of the best way to move the case forward toward resolution on the merits. ECF No. 1 ¶¶ 3, 27-34. The government already provides a first appearance—albeit not for at least a month—to all detainees in the class, regardless of what statute they are detained under, undermining any argument that those statutes meaningfully distinguish members of the class from one another.

The *Rodriguez I* class members all presented a common legal question—*i.e.*, "may an individual be detained for over six months without a bond hearing under a statute that does not explicitly authorize detention for longer than that time without generating serious constitutional concerns?" *Rodriguez I*, 591 F.3d at 1123. Here, a parallel question is presented: may an individual be detained for over 30 days without an initial hearing under a statute that does not explicitly authorize detention without a hearing for longer than that time without generating serious constitutional concerns? Here, as in *Rodriguez I*, class certification is justified because it would be "more efficient" and eliminate the risk that the "claim would become moot before the district court could come to a decision" in individual suits. *Id.* Defendants do not and cannot distinguish *Rodriguez I*.

Defendants also do not cite any case that denies class certification based on differences in how long the unreasonable delay for a detainee is. All these individuals face the same harms when they are detained for longer than 30 days without a first appearance before an IJ, regardless of the grounds for their detention. Even if there were differences—such as one group being detained an average of 45 days without a hearing, and another 75 days—that would impact only how badly their rights have been violated, but it would not change the common nature of the violation. A prompt first appearance gives them all a universal remedy: a prompt hearing at which they might challenge their detention, as well as receive the other benefits described above.

In the criminal context, for example, anyone accused of a crime has to be brought before a judicial officer for an arraignment within the same period, regardless of why they are being held, be it murder, DUI, or petty theft. There is no reason that detention for immigration purposes should be different, especially when "[c]ivil

immigration detainees are treated much like criminals serving time." *Rodriguez v. Robbins*, 804 F.3d 1060, 1073 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016) (*Rodriguez III*).

Plaintiffs seek nothing more than that their first hearings be provided more promptly, and there is nothing in the detention statutes which negates the commonality of that issue. It is true that "[t]he nature of the particular statute authorizing the detention of individual class members will play some role" in the content of that first hearing and the process provided *after* that first hearing,[2] *Rodriguez I*, 591 F.2d at 1123-24, but "the constitutional issue at the heart of each class member's claim" to have that hearing held promptly "is common." *Id.* Simply put, *prior* to seeing a IJ for the first time all members of the class are in the same boat, and their rights to have a prompt first appearance are being violated in the same way. That common question satisfies Rule 23(a)(2), regardless of any other minor or technical variation. *See Parsons*, 754 F.3d at 675.

Ignoring *Rodriguez I*, Defendants instead cite general language and dicta from *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) ("*Wal-Mart*"), an employment discrimination case quite different from the instant case or *Rodriguez I*, none of which changes the analysis here. *Wal-Mart* says that the court must be able to resolve "in one stroke" the issue raised by the putative class, such that the proceeding "generate[s] common answers apt to drive the resolution of the litigation." *Id.* at 350 (internal

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[2] For instance, class members held under 8 U.S.C § 1226(a) may, at the initial hearing, request a bond hearing with the IJ. 8 C.F.R. § 236.1(d). Class members with certain criminal convictions who are held under 8 U.S.C. § 1226(c) are not eligible for such a hearing, but at the initial hearing may request a *Joseph* hearing to challenge that they have been properly designated under § 1226(c), *see In re Joseph,* 22 I. & N. Dec. 660 (BIA 1999); *see also Preap v. Johnson*, 831 F.3d 1193, 1206 (9th Cir. 2016) (overruling government's §1226(c) classification for class of detainees arrested by DHS long after completion of criminal sentence). Applicants for admission detained under 8 U.S.C. § 1225(b) who had already crossed into the United States before apprehension may, at the initial hearing, ask for a subsequent custody review hearing with the IJ, just as §1226(a) detainees can, *see Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005), while others detained under the same statute but who presented themselves at a port of entry may not, *see* 8 C.F.R. § 1003.19(h)(2)(i)(B), though they may also assert that they have been misclassified or misidentified. ECF No. 1 ¶ 30; *see Matter of Lujan-Quintana*, 25 I. & N. Dec. 53, 56 (BIA 2009) (reversing expedited removal order because person was a U.S. citizen).

citation and quotation omitted). That describes the proposed class here to a T. Defendants' policy of detaining the proposed class members over a month before they see a judge is unlawful under the Constitution and relevant statutes or it is not, regardless of the statutory basis for detention. Resolving the constitutional and statutory issues is quite "apt to drive the resolution of the litigation," even if some minor details vary among class members.

Indeed, Defendants' common practice for all class members distinguishes this case from *Wal-Mart*, where there was not a common practice of sex discrimination alleged, because each individual store's managers had discretion in employment decisions, and there was thus no common answer for why each person in the proposed class was paid a particular wage. *See id.* at 355-56. Here, Defendants' common practice of a month or more delay for all proposed class members stems from two common and related causes—Defendant do not believe there is any imperative to provide prompt initial hearings, and they have not instructed immigration judges to make prompt initial hearings a priority. *See, e.g.,* ECF. No. 1, ¶¶ 6, 28, 62-67. Defendants simply do not recognize the right asserted here, and thus have made no accommodation for it, trumping any individual variations in scheduling (like holiday weekends or allowing detainees more time to obtain counsel, ECF No. 30 at 20:1-4), which they have not demonstrated even exist.[3]

The proposed class thus satisfies Rule 23(a)(2) under *Rodriguez I*, which remains good law after *Wal-Mart*, as evidenced by the other cases that still cite it with approval, *see, e.g., Evon v. Law Office of Sidney Mickell*, 688 F.3d 1015, 1030 (9th Cir. 2012);

[3] For instance, Defendants have not demonstrated that the scheduling of a first hearing is altered in any way based on a detainee's request for more or less time to find counsel, Quite to the contrary, the records they submitted establish that they do no such thing. Plaintiff Cancino Castellar purportedly informed DHS that he did not want extra time to find an attorney, ECF No. 28-2, Exh. B, but spent 34 days in custody without a hearing. On the other hand, Ms. Hernandez Aguas purportedly informed DHS that she wanted time to find an attorney, ECF No. 28-2, Exh. H, but she also spent 34 days in custody without a hearing.

Balasanyan v. Nordstrom, Inc., 294 F.R.D. 550, 559 (S.D. Cal. 2013); *In re Ferrero Litigation*, 278 F.R.D. 552, 558 (S.D. Cal. 2011), and by the fact that *Rodriguez I* continued as a certified class for years after *Wal-Mart*, including two more trips to the Ninth Circuit. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1130 (9th Cir. 2013) (*Rodriguez II*); *Rodriguez v. Robbins*, 804 F.3d 1060, 1073 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016) (*Rodriguez III*).

2. Certain Groups of Immigration Detainees Are Not in the Proposed Class

Aside from relying upon the three statutes under which most detainees are held, Defendants oppose class certification because of the existence of certain unique groups of detainees who are not intended to be in the proposed class. For example, Defendants discuss "aliens who are placed in expedited removal" and can be removed without a hearing. ECF No. 30 at 16. But the proposed class definition exempts those "with final removal orders" and those who have been detained less than 48 hours. ECF No. 2-1 at 7. Aliens who meet the criteria for expedited removal and do not express an intent to seek asylum should have a final removal order before they have been detained 48 hours, and thus never become part of the proposed class. *See* 8 U.S.C. §§ 1225(b)(1)(A)(i), 1228(b). To the extent that their exclusion from the class is not already clear, the class definition could be tweaked to make this explicit.

Defendants' comments on unaccompanied alien children, ECF No. 30 at 21-22, are similarly inapplicable, because these children are highly unlikely to be (and not intended to be) class members. The proposed class definition implicates only those detained for more than 48 hours by the Department of Homeland Security ("DHS"), and, as Defendants note, these unaccompanied children will be out of DHS custody (and transferred to the care of the Department of Health & Human Services) by the 72 hour mark. *See* 8 U.S.C. § 1232(b)(3). Thus, some unaccompanied children may fall within the class definition for, at most, one day. Again, the class definition could be tweaked to clarify their exclusion.

3. The Named Plaintiffs All Experienced Delays that Are Typical of Defendants' Practice of Delayed Presentment to an IJ

The proposed class satisfies Rule 23(a)(3)'s typicality requirement, because the named plaintiffs' claims are "reasonably coextensive with those of the absent class members," reflect "the same or similar injury," are "based on conduct which is not unique to the named plaintiffs." *Parsons*, 754 F.3d at 685 (internal citation and quotation omitted). The named Plaintiffs raise constitutional and statutory claims challenging the Defendants' practice of improperly delaying first presentment to an IJ for longer than one month. ECF No. 1, ¶ 58; ECF No. 2-2, ¶ 4.)

Each Plaintiff's circumstances are typical of that practice. Mr. Cancino Castellar was detained 34 days before his first hearing, as was Ms. Hernandez Aguas (though her first hearing was a bond hearing secured by her lawyer, and while it is unclear when the government would have scheduled her first master calendar hearing if the IJ hadn't released her on bond, it could not have happened earlier than 30 days), and Mr. Gonzalez was detained 117 days before his first hearing. ECF No. 1 ¶¶ 47-49; ECF No. 30 at 7-10. Each Plaintiff's injury has the same underlying cause—Defendants do not recognize the unique importance and constitutional imperative of a prompt first appearance and therefore make no accommodation for it—and that same problem is inflicting the same harm on the rest of the proposed class. ECF. No. 1, ¶¶ 6, 28, 62-67. Moreover, the named Plaintiffs suffer the common harms, discussed *supra* at 5-7, from a delayed first hearing that the other class members do. *Id.* at ¶¶ 28-33.

Defendants' main response on typicality is to again complain that different proposed class members are detained under different statutes. ECF No. 30 at 22-23. But, as noted above (fn. 2), these differing statutes only confer different benefits with regard to the type of custody challenge a detainee can pursue, not whether they can challenge custody at all. The first appearance provides all class members with the same opportunity for an immigration judge to review the charging document and any justification for detention stated therein, the same opportunity to assert a challenge to

the necessity of their continued custody, as well as receive other important benefits and safeguards applicable to every member of the class. Although Defendants speculate that the statutory grounds for the detention might impact the delays, ECF No. 30 at 23, they don't actually cite any evidence or examples that would support this. Regardless, Defendants do not deny that all three statutory groups are subject to delays over 30 days, and that each group claims violation of constitutional and statutory rights. Any differences in delay beyond that would impact only how badly their rights have been violated. Thus, each Plaintiff and each class member has "suffered the same injury for the same reason," *DL v. District of Columbia*, 302 F.R.D. 1, 12 (D.D.C. 2013), because a single practice affects all proposed class members.

The same rationale applies to Defendants' comment, in a footnote, that all of the named Plaintiffs were detained at the Otay Detention Facility. ECF No. 30 at 23 n.21. Defendants have provided no evidence that their policies within this district differ based on the facility and that the Otay and Imperial facilities are overseen by the same Field Office of ICE and the same Chief Immigration Judge. ECF No. 1 ¶¶ 15, 59. Once again, *Rodriguez I* controls, as it rejected the same argument where defendants "cite no authority or rationale for the proposition that we do not have jurisdiction to provide class relief in a habeas corpus action that meets the requirements for certification merely because class members are in the immediate custody of different facilities." *Rodriguez I*, 591 F.3d at 1121. If the Court has any lingering concern about differences in treatment between the facilities, Plaintiffs have provided declarations from three detainees at the Imperial facility, which demonstrate they have experienced similar delays. Decl. of Bardis Vakili ("Vakili Decl.") at ¶¶ 3-5, Exs. A-C[4].

[4] The Exhibits cited herein are Exhibits to the Declaration of Bardis Vakili filed concurrently herewith. In particular, Exhibit A is the signed declaration of Jose Pelayo Munguia, Exhibit B is the signed declaration of Ever Barrera Rodriguez, and Exhibit C is the signed declaration of Shire Abdi Mohammed.

B. This Civil Rights Case Satisfies Rule 23(b)(2), Because It Seeks to Enjoin a Practice That Applies to the Class as a Whole

This case meets the certification requirements of Rule 23(b)(2) because Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The "primary role" of Rule 23(b)(2) "has always been the certification of civil rights class actions." *Parsons*, 754 F.3d at 686. "[I]t is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez I*, 591 F.3d at 1125-26 (certifying Rule 23(b)(2) class of immigration detainees because "all class members[] [sought] the exact same relief as a matter of statutory or, in the alternative, constitutional right"). This case fits squarely within these principles—all proposed class members suffer under a common practice (detention for over one month without a first appearance), and all seek the same relief (a speedier first appearance).

Defendants' only response is to repeat their refrain that proposed class members are detained under different statutes, which they say has "a bearing on the length of time an alien is detained before appearing before an immigration judge." ECF No. 30 at 26. Again, whether one category of detainees is held an average of 45 days and another an average of 75 days, the claims remain the same.

Nor have Defendants made a case that the class members' constitutional claims vary with the precise statute under which they were detained. Whatever the contours of Congress's power to dictate the process afforded to arriving aliens in their applications for admission to the U.S., no court has held that Congress has "plenary power" to authorize a blanket rule of incarceration for over a month with no process at all.[5] *See*

[5] Defendants assertion of blanket detention authority appears to stem from the so-called "entry fiction" doctrine. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543-44 (1950). The government's faulty logic is discussed in more detail in Plaintiffs' Opposition to Defendants' Motion to Dismiss at 30-33, but for present purposes, it

I.N.S. v. Chadha, 462 U.S. 919, 941 (1983) (holding Congress must choose "a constitutionally permissible means of implementing" authority over immigration.). Regardless, Plaintiffs' claim is that Congress has made no such authorization, and that Defendants are operating outside their statutory authority, when properly construed. All class members seek a common injunction and declaration that the current system of 30 day-plus confinement without a hearing is illegal. Certification is warranted because that relief would apply to "the class as a whole." Fed. R. Civ. P. 23(b)(2).

C. All Class Members Have the Same Procedural Due Process Rights to a Prompt First Hearing

Defendants do not assert any specific differences among class members in the analysis of the (1) Fourth Amendment claims, which requires prompt judicial review of probable cause for detention, (2) the substantive due process claims for violations of detainees' fundamental right to be free from confinement without a prompt hearing, or (3) the statutory claim that the government's practice is in excess of the authority conferred upon them by Congress. This alone should warrant certification. *See Parsons*, 754 F.3d at 675.

Defendants do take special issue with certification of the claim of deprivation of procedural due process, but they misperceive the law. The due process clause requires a "prompt post-deprivation hearing" when the government takes away someone's liberty. *See, e.g., Comm'r of Internal Review v. Shapiro*, 424 U.S. 614, 629 (1976). The parties agree that *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides the relevant framework for determining if the hearing is sufficiently prompt, and requires considering (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous

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suffices to say that the entry fiction doctrine says nothing about substantive due process, Fourth Amendment rights, or whether immigration agencies are acting outside the statutory authority conferred to them by Congress. Even with regard to Plaintiffs' procedural due process claim, the entry fiction is inapplicable because it only limits challenges to the process provided to arriving aliens in their applications for admission or entry into the United States, not to the rights of individuals facing lengthy detention to be presented promptly to a judge.

deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Although the class members may have been detained in different circumstances or have different types of legal status, the *Mathews* factors will not vary with those circumstances. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) ("[R]egardless of whether an arrestee is a citizen, a lawful resident or an undocumented immigrant, the costs to the arrestee of pretrial detention are profound."). Each of the *Mathews* factors applies in the same way to all the detainees in the proposed class—(1) each person's interest in their liberty is paramount, (2) a prompt initial hearing would allow each person to protect that liberty by learning, among other things, the charges against him or her, the avenues they might pursue to defend themselves, and facilitating access to counsel, and (3) the government has no legitimate interest in refusing to provide prompt initial hearings to any of these detainees, regardless of which the statute under which they are held or their underlying legal status. Put another way, Defendants' assertions of a legitimate interest in denying a prompt hearing will not vary from statute to statute or case to case, since in each case the statute does not explicitly provide for a prompt initial hearing, and Plaintiffs assert that the constitution (or the relevant statute) requires that one be provided. That dispute can be resolved "in one stroke."

The language in *Matthews* that the due process clause is "flexible," and that the process due varies with the circumstances, ECF No. 30 at 24-25, does not prohibit class actions in procedural due process cases simply because the "individual circumstances" of each class member are different. No doubt the individual circumstances of each class member in a class action claiming, for instance, that welfare benefits cannot be withdrawn without a hearing, may vary, but that does not bar a class action asserting that all of them are entitled to a hearing. *See Califano v. Yamasaki*, 442

U.S. 682, 701 (1979) (where due process "question is whether a prerecoupment hearing is to be held," class relief "is peculiarly appropriate" because due process issue is "common to the class as a whole" and "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue" whether hearing is required).

In similar circumstances, the Ninth Circuit rejected "the government's dogged focus on the factual differences among the class members" as "a fundamental misunderstanding" of Rule 23(b)(2). *Walters*, 145 F.3d at 1047. Here as in *Walters*, Plaintiffs claim that class-wide practices violate due process, and while "numerous individual administrative proceedings may flow" from a decision in Plaintiffs' favor, such a decision would eliminate "the need for individual litigation regarding the constitutionality" of the class-wide practice of detaining individuals without a prompt hearing. *Id.* As a result, "class certification in this case is entirely proper in light of the general purposes of Rule 23, avoiding duplicative litigation," given that "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Id.*

Indeed, larger differences among class members than those presented here have not blocked class certification. *See, e.g., Krimstock v. Kelly*, 306 F.3d 40, 55–68 (2d Cir. 2002) (recognizing a "heightened potential for erroneous retention" of seized vehicle when arrestee was not the owner of car compared to when arrestee was the owner, but still applying *Mathews* balancing to require a prompt post-seizure hearing for a class of seized-vehicle owners regardless of arrest); *Barnes v. Healy*, 980 F.2d 572, 577-81 & n.5 (9th Cir. 1992) (employing *Mathews* balancing to conclude that state provided inadequate notice of state-collected child support collections to class of custodial parents, even though parents in class currently receiving state funding and parents in class who do not had different rights to receive funds); *cf. Parsons*, 754 F.3d at 675 (rejecting argument that class should not be certified because "healthcare and conditions-of-confinement claims are inherently case specific and turn on many individual inquiries."). Therefore, whatever differences may exist in the individual cases,

class certification is appropriate because "common questions of law and fact which predominate over any factual questions unique to each individual." *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1491 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001), cited by Defendants for the generic and uncontroversial principle that due process requires hearings in some circumstances but not others, ECF No. 30 at 24:14-16, does not help Defendants either. *Lujan* is not even a class action, and merely held that withholding payment to subcontractors for services allegedly not rendered, without a prior hearing, did not violate due process, distinguishing cases in which the withholding of money in other contexts without a hearing, such as wage garnishment, was found unlawful. *See id.* at 196-97. Here there is no similar substantial distinction between persons detained under 8 U.S.C. §§ 1226(a), 1226(c), or 1225(b) in terms of their right to a process that affords them a prompt hearing concerning their continued confinement.

D. Any Lingering Doubt Can Be Resolved Through the Creation of Subclasses

For the reasons stated above, the class proposed by Plaintiffs warrants certification as currently defined, though the Court is free, if it deems it necessary, to make minor tweaks to the definition, or request Plaintiffs do so, to make the exclusion of unaccompanied minors and people with final expedited removal orders more explicit than it already is.

If the Court has any remaining concern about commonality, the problem could be readily remedied by creating subclasses, now if the Court sees an immediate issue, or later as the facts and the case develop. *See, e.g., Rodriguez I*, 591 F.3d at 1123-24; Fed. R. Civ. P. 23(c)(5). Plaintiffs can devise no rational reason why putative class members detained under § 1226(a) and § 1226(c) should be divided into subclasses, as they are provided the same process from the 48 hour mark of detention, when class membership begins, to first appearance, when it ends. But class certification decisions

are always provisional, subject to amendment, and creating subclasses (as well as modifying class definitions) often occurs after certification.

For putative class members who would otherwise be subject to summary removal but are not because they have expressed a fear persecution or torture upon removal, there is at least some basis for the Court to consider creating a subclass. Because these individuals must, under the Immigration and Nationality Act, go through "credible fear" or "reasonable fear" interviews prior to being referred to immigration court, this additional step in the process may, at the remedy stage, lead the Court to the conclusion that, whatever the statutory limits on detention before presentment may be for the rest of the class, a slightly longer period of detention would be lawful for these detainees to accommodate the interviews. Such a subclass would only be necessary if the remedy provided for the rest of the class could not realistically be accommodated by holding more prompt credible and reasonable fear interviews for this group.[6]

Specifically, applicants for admission detained under 1225(b), either at a port of entry or within the United States, who lack documentation or possess fraudulent documentation for entry into the U.S., are subject to expedited removal "unless the alien indicates either an intention to apply for asylum… or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A). In those cases, the asylum seeker is referred for a "credible fear" interview.[7] 8 U.S.C. § 1225(b)(1)(B). If the asylum seeker is found to have a credible fear—a finding that there is a "significant possibility…. that the alien could establish eligibility for asylum," 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV) & (b)(1)(B)(v)—then

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6 Fear interviews themselves take unreasonably long—as they did for Mr. Gonzalez, for whom it took 29 days, ECF No. 1 ¶ 49—which adds to the unreasonable delays faced by members of the class.

7 A substantially similar process as described in this paragraph is available to individuals who express a fear of persecution who would otherwise be subject to a different type of "expedited removal" (under 8 U.S.C. § 1228(b) as opposed to 8 U.S.C. § 1225(b)(1)(A)) or to a reinstatement of a prior removal order. Such detainees receive a "reasonable fear" interview instead of a "credible fear" interview because they are ineligible for asylum, but the process will still result in presentment before an IJ to consider eligibility for other forms of protection. *See* 8 U.S.C. §§ 1231(a)(5), (b)(3); 8 C.F.R. § 208.31.

the case is referred to the immigration court and processed under section 240 of the INA like any other removal proceeding. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 235.6(a)(1)(ii), 208.30(f). If found not to have a credible fear, the applicant may still seek "prompt review by an immigration judge" of the determination, to be "concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the negative determination. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

Because these individuals must go through an interview process before reaching an immigration judge pursuant to the statute, Plaintiffs acknowledge that the Court may find it expedient to create a Credible and Reasonable Fear Subclass. Defendants present no basis why Mr. Cancino Castellar and Ms. Hernandez would not be typical of all those who are detained under the larger class or why Mr. Gonzalez would not be typical of a Credible and Reasonable Fear Subclass. Individual subclasses would thus address even the Defendants' erroneous concerns with class certification.

III. CONCLUSION

For the reasons above, the Court should certify the proposed class.

Dated: June 12, 2017

ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

By: S/Bardis Vakili
BARDIS VAKILI

Attorney for Plaintiff-Petitioners
Email: bvakili@aclusandiego.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on June 12, 2017 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ LR 5.4(d). Any other counsel of record will be served by U.S. mail or hand delivery.

S/Bardis Vakili
BARDIS VAKILI

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOSE ORLANDO CANCINO CASTELLAR et al.,

Plaintiff-Petitioners,

v.

JOHN F. KELLY, Secretary of Homeland Security, et al.,

Defendant-Respondents.

Case No. 3:17-cv-00491-BAS-BGS

DECLARATION OF BARDIS VAKILI IN SUPPORT OF PLAINTIFF-PETITIONERS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I, Bardis Vakili, hereby declare as follows:

1. I have personal knowledge of the facts set forth below and if called to testify, I could and would do so competently.

2. I am a Senior Staff Attorney with the ACLU of San Diego & Imperial Counties.

3. Attached as Exhibit A to this declaration is a true and correct copy of a signed declaration from Jose Pelayo Munguia, as well as a certified translation.

4. Attached as Exhibit B to this declaration is a true and correct copy of a signed declaration from Ever Barrera Rodriguez, as well as certified translation.

5. Attached as Exhibit C to this declaration is a true and correct copy of a signed declaration from Shire Abdi Mohammed.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing statements are true and correct.

Executed this 12th day of June 2017 in San Diego, California.

S/Bardis Vakili
Bardis Vakili

EXHIBIT INDEX

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Exhibit A

I, Jose Pelayo Munguia, hereby declare as follows:

1. I have personal knowledge of the facts set forth below and if called to testify, I could and would do so competently.

2. My name is Jose Pelayo Munguia. I was born on October 19, 1990. I am currently being detained at Imperial Regional Detention Facility.

3. On March 2, 2017, Immigration and Customs Enforcement (ICE) agents took me into custody. I spent that night at Otay Mesa Detention Center.

4. On March 3, 2017 ICE agents took me to their office in downtown in San Diego to interview me. The ICE agent told me I would see an immigration judge in around 10-12 days.

5. I remained at Otay Mesa Detention Center from March 3, 2017 until the early morning of March 8, 2017, when ICE transferred me from Otay Mesa Detention Center to Imperial Regional Detention Facility.

6. I arrived at Imperial Regional Detention Facility on the morning of March 8, 2017.

7. During my confinement, I have not been given a hearing of any kind and I have not been brought in front of an immigration judge. I have not received any documents signed by a judge.

8. I have called the number that tells people when their next hearing is, and it says I have a master calendar hearing on April 11, 2017. However, I have received no written notice of this hearing and would not have known I had a hearing scheduled if not for knowing to call that number.

9. Nobody from the government has told me what I can do to try to be released or what I can be doing to move my immigration case forward while I have been detained. I feel confused and powerless because I have not seen an immigration judge to know what is going to happen and what to expect.

10. I am anxious and desperate to be released because my U.S. citizen fiancé is pregnant with our first child and I want to be able to support her during her pregnancy.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing statements are true and correct.

Executed this ____ day of April 2017 in Calexico, California.

Jose Pelayo Munguia

Certificate of Translation

I, Gabriel Orea, hereby declare that I am competent to translate from English into Spanish, and vice versa, and certify that the translation of the Declaration of Jose Pelayo Munguia is true and accurate to the best of my abilities.

Address: ACLU of San Diego and Imperial Counties
PO Box 87131
San Diego, CA 92138-7131
Phone No.: (619) – 232 – 2121

Gabriel Orea
Signature

04/04/2017
Date

Yo, José Pelayo Munguía, declaro lo siguiente:

1. Tengo conocimiento personal de los hechos expuestos a continuación y si me llaman para testificar, podría y lo haría con competencia.

2. Mi nombre es José Pelayo Munguía. Nací el 19 de octubre de 1990. Actualmente estoy detenido en el Centro de Detención Regional de Imperial.

3. El 2 de marzo de 2017, agentes de la Agencia de Inmigración y Aduanas (ICE) me llevaron bajo custodia. Pasé esa noche en el Centro de Detención de Otay Mesa.

4. El 3 de marzo de 2017 los agentes de ICE me llevaron a su oficina en el centro de San Diego para entrevistarme. El agente de ICE me dijo que vería a un juez de inmigración en alrededor de 10-12 días.

5. Permanecí en el Centro de Detención de Otay Mesa desde el 3 de marzo de 2017 hasta la madrugada del 8 de marzo de 2017, cuando ICE me transfirió del Centro de Detención de Otay Mesa al Centro de Detención Regional de Imperial.

6. Llegué al Centro de Detención Regional de Imperial en la mañana del 8 de marzo de 2017.

7. Durante mi confinamiento, no me han dado una audiencia de ninguna clase y no he sido presentado ante un juez de inmigración. No he recibido ningún documento firmado por un juez.

8. He llamado el número que le informa a la gente cuándo es su próxima audiencia y dice que tengo una audiencia maestra del calendario el 11 de abril de 2017. Sin embargo, no he recibido notificación escrita de esta audiencia y no habría sabido que tenía una audiencia programada si no por saber llamar a ese número.

9. Nadie del gobierno me ha dicho lo que puedo hacer para tratar de ser liberado o lo que puedo hacer para hacer avanzar mi caso de inmigración mientras estoy detenido. Me siento confundido e impotente porque no he visto a un juez de inmigración para saber qué va a pasar y qué esperar.

10. Estoy ansioso y desesperado por ser liberado porque mi prometida con ciudadanía estadounidense está embarazada de nuestro primer hijo y quiero poder apoyarla durante su embarazo.

Declaro bajo pena de perjurio de las leyes del Estado de California y los Estados Unidos que las declaraciones anteriores son verdaderas y correctas.

Ejecutado este 4 día de abril de 2017 en Calexico, California.

José Pelayo

José Pelayo Munguía

Exhibit B

I, Ever Barrera Rodriguez, hereby declare as follows:

1. I have personal knowledge of the facts set forth below and if called to testify, I could and would do so competently.

2. My name is Ever Barrera Rodriguez. I was born on October 1, 1998. I am currently being detained at Imperial Regional Detention Facility.

3. On December 10, 2017, I presented myself for asylum at Calexico Port of Entry.

4. I spent 5 days at Calexico Port of Entry until DHS transferred me to San Luis Regional Detention Center (SLRDC). I spent approximately 13 days at SLRDC.

5. I arrived at Imperial Regional Detention Center on December 28, 2016.

6. I was not brought before an immigration judge until February 15, 2017. Prior to that hearing, nobody from the government had told me what I could do to move my case forward while being detained. I felt confused and powerless because I had not seen an immigration judge and I did not know what was going to happen or what to expect.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing statements are true and correct.

Executed this ____day of May 2017, California.

Ever Barrera Rodriguez

Certificate of Translation

I, Gabriel Orea, hereby declare that I am competent to translate from English into Spanish, and vice versa, and certify that the translation of the Declaration of Ever Barrera Rodriguez is true and accurate to the best of my abilities.

Address: ACLU of San Diego and Imperial Counties
PO Box 87131
San Diego, CA 92138-7131
Phone No.: (619) – 232 – 2121

Signature

5/8/2017
Date

Yo, Ever Barrera Rodríguez, declaro lo siguiente:

1. Tengo conocimiento personal de los hechos expuestos a continuación y si me llaman para testificar, podría y lo haría con competencia.

2. Mi nombre es Ever Barrera Rodríguez. Nací el 1 de octubre de 1998. Actualmente estoy detenido en el Centro de Detención Regional de Imperial.

3. El 10 de diciembre de 2017, me presenté para asilo en la garita de Calexico.

4. Pasé 5 días en la garita de Calexico hasta que DHS me transfirió al Centro de Detención Regional de San Luis (SLRDC). Pasé aproximadamente 13 días en SLRDC.

5. Llegué al Centro de Detención Regional de Imperial el 28 de diciembre de 2016.

6. No fui llevado ante un juez de inmigración hasta el 15 de febrero de 2017. Antes de esa audiencia, nadie del gobierno me dijo que podía hacer para avanzar mi caso mientras yo estaba detenido. Me sentía confundido e impotente porque no había visto a un juez de inmigración y no sabía qué iba a pasar ni qué esperar.

Declaro bajo pena de perjurio de las leyes del Estado de California y los Estados Unidos que las declaraciones anteriores son verdaderas y correctas.

Ejecutado este 8 día de mayo de 2017 en Calexico, California.

Ever Barrera Rodríguez

Exhibit C

I, Shire Abdi Mohamud, hereby declare as follows:

1. I have personal knowledge of the facts set forth below and if called to testify, I could and would do so competently.

2. My name is Shire Abdi Mohammed. I was born on May 15, 1993. I am currently being detained at Imperial Regional Detention Facility.

3. On or around February 1, 2017, I presented myself for asylum at Calexico Port of Entry.

4. I arrived at Imperial Regional Detention Facility on February 2, 2017.

5. I received my Notice to Appear on or around February 17, 2017.

6. I was not brought before an immigration judge until April 17, 2017.

7. Prior to my first hearing, nobody from the government had told me what I could be doing to move my immigration case forward while being detained. I felt confused and powerless because I had not seen an immigration judge to know what to expect and what was going to happen.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing statements are true and correct.

Executed this 8th day of May 2017 in Calexico, California.

Shire Abdi Mohamud